NO. 48450-1

COURT OF APPEALS, DIVISION OF THE STATE OF WASHINGTON

MICHAEL SEGALINE,

Respondent,

v.

WASHINGTON STATE DEPARTMENT OF LABOR AND INDUSTRIES and ALAN CROFT,

Appellants.

APPELLANTS' BRIEF

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I. INTRODUCTION

This case arises from the issuance of a no trespass notice by Defendant Alan Croft, the Regional Safety and Health Coordinator for the Washington State Department of Labor and Industries for Eastern Washington, to the Plaintiff, Michael Segaline, who was an electrical contractor. The notice was issued following reports to Croft that Segaline had been intimidating staff in the East Wenatchee office who were afraid of Segaline. Croft met with Segaline and requested that he interact with the Labor and Industries employees in a nonthreatening manner. When Segaline refused, Croft sought the advice of the Washington State Patrol and was advised he could issue a no trespass notice. Croft issued the no trespass notice, which specifically provided information to Segaline about how to get the no trespass notice removed. After Segaline violated the no trespass notice, he was arrested and ultimately sued Labor and Industries and Croft on numerous claims. The sole claim that remains for review by this Court in this appeal is the 42 U.S.C. § 1983 civil rights claim that was brought against Croft for the issuance of the no trespass notice.

The original judge in this case granted Croft qualified immunity and dismissed the civil rights no trespass notice claim. Following several appeals and an ultimate remand to superior court, Judge Gary R. Tabor reversed the previous grant of qualified immunity, concluding there was a

question of fact on whether the law was clearly established. Judge Tabor's ruling was clear error. Under federal civil rights law, a defendant is entitled to qualified immunity from suit and liability unless the law is so clearly established that every reasonable person would know that what he or she was doing was unlawful. There is no case law establishing a right to enter a public building after being repeatedly disruptive, nor is there any case law indicating that if such a due process right existed as to what amount of due process was required in order to legally deprive a person of such a right. Alan Croft should never have been subjected to trial or this claim.

At trial, the court committed prejudicial error. Specifically, in relation to the issuance of a trespass notice, the court failed to instruct the jury as to what amount of process was due, and instead left the application of the three part *Mathews v. Eldridge* test (424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)), a legal issue, for the jury to decide.

> *Due process is a flexible concept* and that the *procedures required depend upon the facts of a particular circumstance*. Due process requires the opportunity to be heard at a meaningful time in a meaningful manner. You may consider the timing of the trespass notice but are not to consider issues as to the legalities of the form of the notice. *In determining reasonableness of the opportunity for hearing, you should consider*: The nature of *Mr. Segaline's interest; The risk of wrongful deprivation* by the procedures, if any, that were used and the *value of additional procedures; and the government's interest,*

> *including the burdens that accompany additional procedures. You should also consider* whether there was *notice and opportunity to be heard available* to remedy any wrongful deprivation.

CP 832 (Jury Instruction 13) (emphasis added).

Not surprisingly, in the complete absence of any legal guidance about the scope of this alleged due process right, the jury found Croft had not afforded Segaline adequate due process before issuing a no trespass notice. The jury found in favor of the defendants on all of the other claims. Allowing the jury to determine constitutional parameters of this § 1983 claim violates article IV, section 16 of the Washington Constitution (a judge must determine the law).

This Court should reverse and order judgment to be entered in favor of Croft based upon his entitlement to qualified immunity. In the alternative, this Court should reverse and remand the case for a new trial based upon the trial court's instructional error in failing to give the jury any guidance on the amount of due process that was required in the issuance of a no trespass notice.

II. ISSUE STATEMENTS

1. Did the trial court err in denying qualified immunity when Plaintiff failed his burden to show that every reasonable official would have known what due process rights were required when trespassing a

repeatedly disruptive person from a Washington State Department of Labor and Industries office?

2. Did the trial court err by allowing the jury to determine what due process should have been afforded to Segaline in the context of a repeatedly disruptive patron's alleged Fourteenth Amendment right to due process to enter a public office?

3. Did the trial court err in excluding evidence that failed to allow Defendants to argue their theory of the case that employees needed protection?

III. ASSIGNMENT OF ERRORS

1. The trial court erred by failing to grant Croft qualified immunity because issuing a no trespass notice based on Segaline's disruptive behavior did not violate a clearly established constitutional right to any specific due process.

2. The trial court erred by providing Jury Instruction 13, which left it up to the jury to decide the law regarding what amount of due process Croft should have afforded Segaline.

3. The trial court erred by excluding the testimony of Officer Dieringer that Segaline may have returned with a weapon, which prevented Defendants from arguing their theory of the case that employees needed protection.

4. The trial court erred by declining to give Defendants' proposed special verdict form to the jury and Defendants' jury instructions 1-3 (providing what process was due) and 6 (limitation to the right to be in a public building).

5. The trial court erred by entering judgment against Croft.

IV. FACTS

Defendant/Appellant Alan A. Croft serves as the Regional Safety and Health Coordinator for the Washington State Department of Labor and Industries (L&I) for Eastern Washington. RP 307. Croft possesses a Masters in Organizational Development, a Bachelor of Science in Occupational Safety and Health Management, and 21 years of experience as a Regional Safety and Health Coordinator. RP 307-08. Croft is responsible for implementing L&I policies to ensure a safe workplace, which also means that "Labor and Industries is charged with protecting their own employees." RP 368; *see also* CP 934. Croft is on a team that serves customers in nineteen offices throughout the state with 2,800 skilled employees. RP 367-68. Croft designed and implemented training to safely handle difficult clients who demonstrate any of the *Five Warning Signs of Escalating Behavior*. CP 961; RP 347-75, 377.

Plaintiff/Appellee Michael Segaline is an administrator of an electrical business. RP 115, 246. He frequented the L&I building in

East Wenatchee to obtain permits. RP 80, 118. The L&I office assists customers with permits, as well as services in nearly twenty programs, including workers compensation, wage disputes, and contractor registrations. RP 541. In seeking electrical permits, Segaline began behaving in a disruptive and inappropriate manner to the level that L&I staff were afraid for their safety. RP 250. Segaline admittedly said to L&I customer service specialists: "if I wind up dead . . ."; "if it costs you your job so be it"; and "a lot of people would be behind bars." RP 250-51.

This prompted Croft to set up a meeting with Segaline to discuss how Segaline could conduct business without conflict. RP 253, 256. This meeting was in addition to a phone call, letter, and notification of how a no trespass notice could be rescinded, all of which was afforded to Segaline. RP 252-53, 341; CP 943, 959.

The meeting abruptly dissolved without resolution because of Segaline's fixation on nonissues. RP 257, 398. Specifically, Segaline insisted on knowing what statutory provision prevented him from recording the conversation without everyone's consent, even though everyone had provided consent and the meeting was in fact being recorded. RP 257, 398. Segaline also repeatedly demanded to speak with an additional L&I employee whom he was told a number of times was unavailable. RP 399. Despite the concerns with Segaline's behavior

discussed during the meeting, Segaline was determined to do business as usual and went to the lobby. RP 399. Croft observed Segaline to be full of rage "like a balloon about to pop." RP 381. Croft simultaneously felt the hair on the back of his neck raise. RP 381. It appeared to Croft as a real rage going within Segaline. RP 381. Croft determined the situation to be disruptive and escalating to the point of requiring law enforcement, so Croft called 911. RP 399.

After this meeting, Segaline continued his mistreatment of L&I front line staff, leading Croft to contact the Washington State Patrol (WSP) Trooper assigned to assist L&I with workplace violence issues, local retail security, the program Assistant Attorney General (AAG), and the local police department. RP 417-18. Because Croft was concerned for the safety of his staff and his prior attempts to discuss Segaline's conduct with him had been unsuccessful, Croft drafted a no trespass notice. RP 118. This was the first time he had ever felt the need to protect employees in this fashion. RP 420. On June 30, 2003, Segaline received the no trespass notice drafted by Croft. RP 258. According to the no trespass notice, Segaline could have the notice removed by contacting Dave Whittle, the electrical supervisor. CP 959.

On August 22, 2003, Segaline entered the L&I office, despite having received the no trespass notice. RP 262. L&I called the police.

RP 425. The police arrived and told Segaline to leave. RP 589. Instead, Segaline argued with officers and refused to leave. RP 587. The police then arrested Segaline for trespassing. RP 593.

V. PROCEDURAL HISTORY

On June 30, 2003, Segaline received the no trespass notice, informing him that he would be considered trespassing if he were present at the L&I office. CP 959. On August 8, 2005, Segaline filed his complaint against L&I.[1] CP 5-9. In December 2005, Segaline learned through responses to interrogatories that Croft had drafted the no trespass notice.[2] *Segaline v. Dep't of Labor & Indus.*, 144 Wn. App. 312, 331, 182 P.3d 480 (2008).

On August 3, 2006, more than three years after receiving the no trespass notice, Segaline amended his complaint to include a 42 U.S.C. § 1983 civil rights claim against Croft. *Segaline v. Dep't of Labor & Indus.*, 169 Wn.2d 467, 477, 238 P.3d 1107, 1112 (2010).

Croft moved for summary judgment on the § 1983 claim on December 21, 2006; the trial court ruled:

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[1] The original complaint alleged: (1) negligent infliction of emotional distress, (2) intentional infliction of emotional distress, (3) malicious prosecution, (4) negligent supervision, and (5) "knowing and wrongful denial of his Civil Rights to liberty, and assembly in a place of public accommodation . . . violation of plaintiff's Constitutional rights and/or plaintiff's Civil Rights." Segaline sought $27 million in damages. CP 5-9.

[2] In June 2006, Croft repeated this information to Segaline during Croft's deposition. CP 107.

> This court finds, that if plaintiff's cause of action had been timely filed, defendant Croft is entitled to summary judgment in that he did not violate plaintiff's consitutional rights, and Croft is entitled to qualified immunity from suit.[3]

CP 107-10. This Court affirmed, but did not decide the qualified immunity issue. *Segaline v. Dep't of Labor & Indus.*, 144 Wn. App. 312, 182 P.3d 480 (2008), *reviewed,* 169 Wn.2d 467, 472, 238 P.3d 1107 (2010). The State Supreme Court reversed summary judgment on Segaline's intentional infliction of emotional distress, negligent supervision, and malicious prosecution claims because "immunity under RCW 4.24.510 does not extend to government agencies." *Segaline*, 169 Wn.2d at 478. They also affirmed the dismissal of Segaline's § 1983 claim as time barred. *Id.* at 476.

On remand, the trial court again granted summary judgment on the claims of negligent supervision and malicious prosecution.[4] CP 140-42. Although the Washington Supreme Court had affirmed the trial court's dismissal of his § 1983 claim against Croft as untimely, Segaline attempted to revive it based on a continuing violation theory, arguing that the accrual date for the statute of limitations should be the date of his

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[3] The trial court dismissed all of Segaline's claims. The trial court held RCW 4.24.510 granted L&I immunity from the majority of Segaline's claims, dismissed his negligent infliction of emotional distress claim as inadequate as a matter of law, and dismissed his § 1983 claim against Croft as untimely.

[4] Segaline abandoned his intentional infliction of emotional distress claim. CP 209.

arrest—August 22, 2003. The trial court denied Segaline's § 1983 claim by relying upon the Supreme Court's decision that the § 1983 claim was time barred as the law of the case. *Segaline,* 169 Wn.2d at 476. In 2013, Segaline appealed the trial court's dismissal of negligent supervision, malicious prosecution, and § 1983 civil rights claims.

This Court affirmed the dismissal of the negligent supervision claim. *Segaline v. State, Dep't of Labor & Indus.*, 174 Wn. App. 1079 (2013), *superseded,* 176 Wn. App. 1012 (2013). However, with regard to his malicious prosecution claim, this Court reversed the dismissal finding, holding that there was a question of fact as to probable cause.[5] *Segaline*, 174 Wn. App. at 1079.

This Court further held that the law of the case doctrine gave the trial court discretion to consider Segaline's continuing violation theory as a basis for concluding that his § 1983 claim was not time barred, and remanded for the trial court to exercise that discretion. *Id.* This Court acknowledged the grant of qualified immunity as an alternate basis to affirm. *Segaline,* 174 Wn. App. at 1079. But, the Court failed to address this despite Croft's specific argument on this point. *See Brief of Respondents* (No. 42945-II) at 31-33.

[5] In the subsequent trial, the jury concluded that L&I did not maliciously prosecute Mr. Segaline. CP 844.

Back on remand in 2015, Segaline brought a motion for a ruling that Croft was not entitled to qualified immunity. CP 258, 278. Procedurally, Croft opposed the motion because the trial court had already ruled in December 2006 that Croft was entitled to qualfied immunity.[6] CP 146, 268, 270. Substantively, Croft contended that he was entitled to qualified immunity as a matter of law because Segaline had failed his burden to show the existence of law clearly establishing that Croft's conduct violated the constitution. CP 268, 343. Judge Gary R. Tabor granted Segaline's motion, finding a genuine issue of material fact as to whether Croft was entitled to qualified immunity. CP 265.

Most recently, in this Court, Defendants sought discretionary review to determine whether Mr. Croft was entitled to qualified immunity. *Ruling Denying Mot. for Discretionary Review,* September 2, 2015. The Commissioner declined to follow *Walden v. City of Seattle,* 77 Wn. App. 784, 892 P.2d 745 (1995) (holding that a party seeking discretionary review from the denial of qualified immunity on a § 1983 claim does not need to show a substantial change in the status quo), denied discretionary

[6] No review court had ever disturbed the trial court's 2006 ruling that Croft was entitled to qualified immunity.

review and sent the matter to trial. *Walden,* 77 Wn. App. at 784.[7] The matter proceeded to trial on the two surviving causes of action—malicious prosecution and "knowing and wrongful denial of his Civil Rights to liberty, and assembly in a place of public accommodation . . . violation of plaintiff's Constitutional rights and/or plaintiff's Civil Rights." CP 7, 843.

On the eve of trial, Segaline included two additional causes of action never plead—violation of the First Amendment protection from freedom of speech and violation of Fourth Amendment protection from unreasonable seizure.[8] RP 20; CP 427, 432-35, 439-42, 475.

In the span of 12 years, Segaline started with five claims. Ultimately, the trial court dismissed two claims as insufficient as a matter of law, and the appeals courts affirmed—negligent infliction of emotional distress and negligent supervision. Plaintiff abandoned one claim—intentional infliction of emotional distress. Two claims went to trial—malicious prosecution and violation of a Fourteenth Amendment right to due process.

All on the eve of trial, and for the first time in his trial brief, Plaintiff attempted to add three more civil rights claims: (1) freedom of

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[7] Defendants sought to modify the Commissioner's ruling, but the trial had concluded before a panel reached the issue; consequently, Defendants withdrew their motion because the issue would be before the Court on direct appeal. *Petitioners' Motion to Withdraw Motion to Modify Ruling*, November 13, 2015.

[8] Segaline had not plead any free speech rights violations or any Fourth Amendment violations in the 10 years of litigation preceding trial.

speech, (2) due process violation for deprivation of a license, and (3) unlawful search and seizure. CP 428. Plaintiff expressly abandoned the previously pled claim for freedom of assembly, claiming Defendants erred in their motions for qualified immunity. CP 512, 475-94, 519-25. He proposed jury instructions and a special verdict form for the three additional claims. CP 422-25.[9] The trial court ruled during trial that the facts did not establish evidence to provide jury instructions for any of the three additional civil rights claims. RP 884-89, 920-24. The trial court also excluded the arresting officer's testimony that at the time of arrest, the police were concerned Segaline might return to the L&I office with a weapon as he did not appear to be fully rational. RP 497-98; CP 404-05. Segaline testified that the arrest statement made by the officer is what devastated him. RP 269.

Defendants' proposed jury instructions 1-3 provided what process was due in relation to the issuance of a no trespass notice. However, despite the defendants' exception, the trial court declined to provide those instructions. RP 1042; CP 445-46. Instead, the trial court provided Jury Instruction 13, which failed to provide what process was due and left it to

[9] Cite is to Plaintiff's special verdict form which includes those three additional unpled causes of action. Plaintiff's proposed jury instructions were not part of the record at drafting time.

the jury to decide the legal question of how much due process Segaline was entitled. CP 832. Jury Instruction 13 provided:

> Due process is a flexible concept and that the procedures required depend upon the facts of a particular circumstance. Due process requires the opportunity to be heard at a meaningful time in a meaningful manner. You may consider the timing of the trespass notice but are not to consider issues as to the legalities of the form of the notice. In determining reasonableness of the opportunity for hearing, you should consider: The nature of Mr. Segaline's interest; The risk of wrongful deprivation by the procedures, if any, that were used and the value of additional procedures; and the government's interest, including the burdens that accompany additional procedures. You should also consider whether there was notice and opportunity to be heard available to remedy any wrongful deprivation.

CP 832.

The case went to the jury with two claims—malicious prosecution against L&I and denial of Fourteenth Amendment right to due process based on the issuance of the no trespass notice. On November 12, 2015, the jury returned a verdict in favor of Segaline and awarded $203,000.00 in economic damages, and $750,000.00 in noneconomic damages, based on their decision that Croft violated Segaline's Fourteenth Amendment right to enter a public office. CP 843-45.

VI. ARGUMENT

A. Croft Is Entitled to Qualified Immunity Because Segaline Cannot Show a Violation of a Clearly Established Right

1. Qualified Immunity Requirements

"Qualified immunity shields federal and state officials from money damages unless a plaintiff pleads facts showing, (1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." *Ashcroft v. al-Kidd,* 563 U.S. 731, 735, 131 S. Ct. 2074, 2080, 179 L. Ed. 2d 1149 (2011) (citing *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982)). Qualified immunity exists because "permitting damages suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties." *Anderson v. Creighton,* 483 U.S. 635, 638, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987).

Qualified immunity, therefore, shields government officials performing discretionary acts "as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." *Anderson,* 483 U.S. at 638. Qualified immunity " 'gives ample room for mistaken judgments' by protecting 'all but the plainly

incompetent or those who knowingly violate the law.' " *Hunter* v. *Bryant*, 502 U.S. 224, 229 (1991) (quoting *Malley* v. *Briggs*, 475 U.S. 335, 341 (1986)). Under qualified immunity, if "officers of reasonable competence" could disagree on whether the alleged conduct violated the constitution, "immunity should be recognized." *Malley*, 475 U.S. at 341.

2. Segaline Fails to Meet His Burden to Show Clearly Established Law

Once the defendant raises the affirmative defense of qualified immunity the burden shifts to the plaintiff to establish that the right alleged to have been violated was clearly established at the time of the defendant's conduct. *Robinson v. City of Seattle,* 119 Wn.2d 34, 65-66, 830 P.2d 318 (1992); *see also Moran v. State,* 147 F.3d 839, 844-45 (9th Cir. 1998). Segaline must cite to case law that pre-existed the events giving rise to the lawsuit that would have clearly delineated the constitutional parameters of what was and was not allowed. *Robinson*, 119 Wn.2d at 66. To violate a "clearly established right," requires that the "contours of the right must be sufficiently clear [so] that a reasonable official would understand that what he is doing violates that right." *Robinson*, 119 Wn.2d at 66 (quoting *Anderson*, 483 U.S. at 640). A court must specifically delineate the right alleged to have been violated in order to determine whether it was clearly established. *Id.*

B. There Was No Clearly Established Right to Be Disruptive in a Public Building

1. Segaline Fails His Burden to Show the Clearly Established Right

In 2003, there was no clearly established right to due process before being issued a no trespass notice to a public building based on prior disruptive and potentially threatening conduct. Segaline never met his burden and has never come forward with any case law that existed at the time when the no trespass notice was issued. There is no case law that showed Croft was obligated to afford any due process to Segaline with regard to the issuance of a no trespass notice to a repeatedly disruptive patron. Likewise, there was no case law delineating the amount of process that was due.

Further, even if such an amorphous right had been recognized, there is no case law addressing its application in the specific context presented here that would advise the public official what amount of due process was required such that every reasonable public official would know what they were doing was unlawful. *See Robinson*, 119 Wn.2d at 66 (quoting *Anderson*, 483 U.S. at 640).

Here, there is no evidence that Croft knew what amount of due process was required to trespass a repeatedly disruptive patron from the

L&I building, nor that the actions he took would be unlawful. Nor could he have know, in the complete absence of any case law, to inform him.

2. Persuasive Authority Shows That Croft Did Not Violate a Clearly Established Right

A recent federal case with similar facts to those here confirms that there was no clearly established right to specific due process before being banned from public property. In that case, a person was banned from entering *all* public property in the city. *Vincent v. City of Sulphur*, 805 F.3d 543 (5th Cir. 2015).

In *Vincent*, a customer service dispute arose between Mr. Vincent and an employee at the local bank. The City of Sulphur defendants then claimed that Mr. Vincent's behavior escalated when he made threatening remarks about the mayor and city councilman involving a weapon. *Vincent v. City of Sulphur*, 28 F. Supp. 3d 626, 632 (W.D. La. 2014). Mr. Vincent denied those statements. *Vincent,* 28 F. Supp. 3d at 632.

City law enforcement defendants unilaterally drafted a no trespass order, verbally informed the plaintiff of the no trespass order at a traffic stop, and the no trespass order stated he would be arrested if he returned to city hall, city council meetings, the police department, and other public offices for any reason. *Id.* at 633. The City defendants were informed by the District Attorney that there was insufficient evidence to pursue any

charges against the plaintiff. *Id.* The City defendants then sent a letter to plaintiff informing him the no trespass order had been terminated. *Id.* Mr. Vincent brought suit under 42 U.S.C. § 1983 for violating his rights under the First, Fifth, and Fourteenth Amendments to the Constitution. *Vincent,* 805 F.3d at 546.

In discussing a procedural-due-process claim regarding a right to enter onto public property, the court surveyed cases from the Supreme Court and concluded:

> Although the Supreme Court decisions amply support the proposition that there is a general right to go to or remain on public property for lawful purposes, none comes near the level of specificity needed to put "beyond debate" the related but distinct proposition that a person under investigation for threatening deadly violence against city officials has the right to notice and a hearing before being banned from entering city buildings. None of the Supreme Court cases mirror the facts or the district court's legal reasoning—in fact, none of them addresses an *Eldridge*-type procedural-due-process claim at all.

Vincent, 805 F.3d at 548 (emphasis in original).

The similarities between *Vincent* and *Segaline* are numerous. Both disputes arose over a customer service dispute, both government actors felt the safety of their employees in jeopardy, both government actors drafted and issued a no trespass notice, both charges of trespass resulted in the plaintiff's favor, and both plaintiffs brought civil rights actions. Also, just like in *Vincent*, no case ever provided in *Segaline* "constitute[s]

persuasive authority adequate to qualify as a clearly established law sufficient to defeat qualified immunity . . . ." *Id.* at 549. Specifically, no case comes near the level of specificity needed to put beyond debate that a person has the right to notice and hearing before being banned from entering city buildings for prior disruptive and disturbing conduct.

Further, in discussing procedural-due-process claims regarding rights to enter public property, *Vincent* reasoned that "the generalized right to go about as one pleases in the pursuit of one's lawful business . . . cannot be said to put a reasonable officer on fair warning that this conduct was unlawful under the instant facts." *Vincent*, 805 F.3d at 550. Similarly, Croft was not given fair warning that his conduct of protecting employees was unlawful when he issued the no trespass notice after checking with WSP, local security, an AAG, and reviewing the trespass RCWs. Therefore, the trial court's denial of qualified immunity is reversible error. If Croft is entitled to qualified immunity, a reversal and directed judgment entered in Croft's favor would make the rest of the issues moot.

3. Segaline's Reliance On *Green* is Misplaced

Segaline attempts to satisfy his burden of showing a violation of a clearly established constitutional right by relying on *Green,* 157 Wn. App. at 833. In *Green*, the plaintiff was denied access to her child's school,

then arrested and convicted of trespass. *Id.* at 852. The Court of Appeals reversed the convictions holding, "We cannot sanction a criminal conviction for violations of restrictions contained in a letter constituting a notice of trespass absent a determination based on competent evidence that the restrictions were lawfully imposed and absent minimal notice of due process rights. Otherwise, 'one would be guilty of trespass by returning to property after being unjustly ordered to vacate it.' " *Green,* 157 Wn. App. at 852 (quoting *State v. R.H.*, 86 Wn. App. 807, 813, 939 P.2d 217 (1997)). In *Green,* the parent had a statutory right to appeal and she was not informed of that right. *Id.* at 848.

There are numerous reasons that *Green* does not satisfy Segaline's burden to show violation of a clearly established right. First, the parent in *Green* had a statutory right to access her child's school, and the court's decision was based in part on the school's failure to follow statutory procedures in preventing the parent's access. *Green*, 157 Wn. App. at 845 (citing RCW 28A.605.020 that requires allowing access to parents unless they are disruptive); 846-47 (parent had statutory right to appeal notice of trespass but was not informed of right); 851-52 (State failed to show that parent had engaged in disruptive conduct as required by statute to justify notice of trespass). Thus, unlike here, the school officials in *Green* could look to specific statutes to guide their conduct. Second, the due process

analysis in *Green*, as with all due process analyses, was a case-specific analysis accounting for the particular rights and procedures in that case. *Id.* at 849-50. Accordingly, its conclusion that the State had not shown sufficient due process in *Green* cannot be transferred wholesale to Segaline's case. Specifically, *Green* says nothing about whether and how a government agency may issue a no trespass notice to a patron for repeated, disruptive, and concerning behavior; so, even if *Green* had been decided before Croft's actions, it would not have put him on notice that his actions clearly violated Segaline's rights. Most importantly, *Green* was decided in 2010, seven years *after* Croft's alleged action here, and thus the opinion itself cannot show that the right to specific due process was clearly established at the time of the alleged violation.

Not only is *Green* not helpful to Segaline because of when it was issued and its different factual and statutory circumstances, but, to the extent it does have application to Segaline's case, it shows that Croft should have had every reason to believe that his actions did not violate a clearly established constitutional right. In *Green*, the court ultimately reversed a criminal conviction because the State had not proven that the parent was actually disruptive such that the school could have prevented her access. *Green*, 157 Wn. App. at 852. In doing so, the court explicitly stated that it did not reach the merits of "whether such restrictions would

have been appropriate had the statutory basis been met." *Id.* The clear implication of the opinion is that if the parent had actually been disruptive, and the statutory requirements for denying access were met, that, at minimum, the no trespass notice might be valid. Such statements fall far short of providing the clear guidance to government officials required for a valid claim under 42 U.S.C. § 1983.

In *Green,* the court also discussed that due process should be provided by a school in issuing a no trespass notice. But the court's due process discussion was largely limited to rebutting a claim that the parent had waived her right to challenge the no trespass notice by failing to appeal it. *Green*, 157 Wn. App. at 849-50. And, again, the due process discussion relied on statutes specifically applicable to a parent's right to access her child's school, so would have little application here. *Id.* In any event, the court determined that "minimal" due process was all that was required. *Id.* The opinion fails to alert officials that issuing a no trespass notice to a disruptive patron, and advising in the notice to contact a specific person to have the notice lifted, would be a clear violation of the patron's rights. If the Court finds Croft entitled to qualified immunity, the remaining issues need not be decided. The matter should be reversed and remanded for entry of judgment in favor of Croft.

C. Even if Due Process Was Required Before Issuing a No Trespass Notice, Croft is Entitled to Qualified Immunity Because He Was Provided Sufficient Due Process

The Supreme Court of Washington applies the *Mathews* three part balancing test in determining due process. *E.g.*, *Tellevik v. Real Prop.*, 120 Wn.2d 68, 78, 838 P.2d 111 (1992) (citing *Mathews*, 424 U.S. at 339).

"Though the procedures may vary according to the interest at stake, the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews,* 424 U.S. at 333. To determine whether existing procedures are adequate to protect the interest at stake, a court must consider the following three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 335; *Post v. City of Tacoma*, 167 Wn.2d 300, 313, 217 P.3d 1179, 1185-86 (2009).

L&I has a clear interest in preserving order in the L&I office to serve customers and to protect persons and property. All L&I customers have a right to access the plethora of L&I services. Likewise, L&I has a

clear interest in safeguarding the 2,800 L&I employees' right to a safe workplace.

Here, Croft provided Segaline with notice and an opportunity to be heard in four separate ways—letter, phone calls, meeting, and the no trespass notice, which included a simple and expedient remedy to lift the trespass notice—"To have this notice terminated, the subject must secure the written approval of David Whittle, Electrical Supervisor, prior to re-entry of the East Wenatchee Department of Labor and Industries service location." CP 959. Specifically, Croft and his team sent Segaline a letter on June 10, 2003, to arrange the June 19, 2003 meeting. Croft and his team took at least two calls regarding the meeting from Segaline in the nine days between the letter and the meeting. Croft and a team member met with Segaline on June 19, where Segaline had the opportunity to be heard at a meaningful time and in a meaningful manner. Croft's actions satisfy the barest of requirements in *Green,* which only stands for the proposition that some minimal due process is required. At a bare minimum, it was not clear that Croft's actions did not provide sufficient due process, which is what is required to defeat qualified immunity.

The parent in *Green* sent a letter to the school board asking for a chance to discuss the no trespass notice. *Green*, 157 Wn. App. at 849. Here, Segaline was provided with the instruction to contact the supervisor

of the East Wenatchee office if he wished to be heard at any time regarding the no trespass notice. CP 959. In *Green*, the school implied the notice was final. *Green*, 157 Wn. App. at 849. Here, Croft provided a no trespass notice that could be lifted by the East Wenatchee supervisor at anytime. Segaline chose not to contact Dave Whittle between the issuance of the no trespass notice on June 30, 2003, and his arrest on August 22, 2003. Yet, he did access L&I on August 21 via phone and in person when he successfully obtained an emergency electrical permit. RP 428-29, 460, 736-37. All of Croft's actions in issuing the no trespass notice provided for protection against the alleged erroneous deprivation of Segaline's rights. Croft met with Segaline before issuing the no trespass notice, to provide a "pre-deprivation" alternative. When Segaline refused to agree to conduct himself in a civil manner, Croft provided notice of the process for having the no trespass notice removed. No more process was due, and, more importantly, there was no case law clearly establishing that more process was due.

D. The Trial Court Erred In Allowing the Jury to Decide the Amount of Process Segaline Was Due

1. Jury Instruction 13 Failed to Provide the Law

What process is due under the Constitution is a legal question that a judge must make. *McGee v. Bauer,* 956 F.2d 730, 735 (7th Cir. 1992).

A litany of cases clearly establish that due process is a legal question, not a factual one. *See In re Welfare of A.G.,* 160 Wn. App. 841, 844, 248 P.3d 611, 613 (2011); *Red Oaks Condo. Owners Ass'n v. Sundquist Holdings, Inc.,* 128 Wn. App. 317, 321, 116 P.3d 404, 406 (2005). Further, under the Washington State Constitution, a jury decides the facts and a judge must determine the law. *See*, Wash. Const. art. IV, § 16; RCW 4.44.080 (Questions of law to be decided by court). The judge determines what process is due and then must instruct the jury to decide the factual questions of whether the required due process was provided. *McGee,* 956 F.2d at 730. Thus, it is an error of law to let a jury decide what actual process is due.

Here, the jury was not instructed on what actual due process was required to be given by Croft to Segaline. The trial court failed to make the necessary determination of what process was due Segaline. Specifically, Jury Instruction 13 failed to provide what process was due. CP 832. Defendants' proposed jury instructions 1-3 provided what process was due; however, the trial court declined to provide those instructions, which the defendants took exception to. RP 1042; CP 445-46. Defendants' proposed jury instruction 3 explained that due process includes a procedure to appeal and providing how to have the no trespass notice removed. CP 446.

Rather, the jury was given large portions of the legal analysis the *Mathews'* court used to determine due process as a matter of law. CP 832; *Mathews,* 424 U.S. at 335. The jury was not given the necessary instruction on *how* to apply *Mathews*. Segaline's predictable assertion that there is no error because the jury found as a matter of fact what process was due is faulty. It was clear error to let a jury decide what process is due. It is axiomatic that a jury does not get to decide law. Allowing juries to determine what process is due would result in an unacceptable level of uncertainty and variability in civil rights litigation. The law would be unestablished and vary from case to case based upon the jury's idiosyncratic determinations of the law. That basis alone requires remand for a new trial.

In addition to not informing the jury what the parameters of the due process rights were, the trial court also left the jury without guidance as to when a government official is legally entitled to tell a customer to leave. The trial court failed to provide Defendants' proposed jury instruction 6 regarding limitations to the right to be in a public building when the individual is harassing, intimidating, and disrupting State employees from providing service to the public. RP 1035, 1040; CP 449.

The trial court also declined to give Defendants' proposed special verdict form to the jury. RP 1040; CP 464. Defendants' proposed special

verdict form included each element of proof required to establish a due process violation: (1) Did Segaline engage in unlawful conduct in the L&I office, (2) Did the no trespass notice contain a provision of how the trespass notice could be removed, (3) Was the law clearly established at the time when the no trespass notice was issued such that every reasonable official would know doing so was unlawful, and (4) was the issuance of the no trespass notice a proximate cause of injury. CP 466. The parties met in chambers November 9, 2015, where the trial court reasoned that because Plaintiff had the burden of proof the trial court would use Plaintiff's special verdict form. CP 856. Defense took exception to the use of Plaintiff's verdict form because it did not include the elements of each claim and left out the necessary law regarding due process.[10] CP 1042. These errors denied Croft a fair trial.

E. Excluding Evidence of Officer Dieringer Prohibited Alan Croft From Arguing His Theory of the Case Was Error

In over two decades serving as the Safety and Health Coordinator, Croft never before felt the need to issue a no trespass notice. Croft became concerned for his employees' safety after reviewing the multiple incident reports from his employees, observing Segaline's bizarre and

[10] Defendants pled and argued the same during the judgment notwithstanding the verdict motion and subsequent hearings. CP 856.

fixated behaviors firsthand, and experiencing the hairs on the back of his neck raise in response to Segaline's actions. RP 317, 381.

Segaline testified at trial that the dispute with the defendants had nothing to do with his behavior. RP 275. Specifically, he testified he never yelled, was not threatening, was not harassing, and didn't refuse to leave when asked by officers on the date of his arrest. RP 262-63.

The trial court excluded the testimony of Officer Dieringer that Segaline appeared irrational as if he would return with a weapon on the date of his arrest. RP 497; CP 404-05. The trial court ruled its probative value was outweighed by the danger of unfair prejudice. CP 498; ER 403. Here, that excluded testimony was relevant and necessary for Defendants to argue their theory of the case—that Croft felt compelled to issue a no trespass notice to protect state employees and the public. RP 497-98.

Officer Dieringer's admitted testimony supported the excluded testimony that Segaline would possibly returning with a weapon. CP 25-26, 400. It was Officer Dieringer's admitted testimony that he observed Segaline: demonstrate "indicators he was potentially dangerous," demanded to speak with *the* Attorney General of the state of Washington or he would keep returning to the L&I office, refuse to leave when police requested him to, and leave L&I staff appearing afraid as if Segaline was going to shoot them. RP 262, 604, 588-89, 592-93; CP 25-26, 400.

The Officer had numerous facts on which to base his opinions that Segaline may return with a weapon, including the Officer's training and expertise as a commissioned law enforcement officer for over twenty years plus Segaline's odd behavior. Segaline demanded to speak specifically with *the* Attorney General of the state of Washington, stating it was the only thing that was going to keep him from coming back to the L&I office. RP 262. The officer's excluded testimony was relevant for the jury to determine whether the no trespass notice had any influence on Officer Dieringer's decision to arrest Segaline for trespass. Officer Dieringer likely had sufficient probable cause to arrest Segaline for trespass, even without the no trespass notice having been issued. This exclusion of evidence left Croft unable to argue his theory of the case—that the employees needed protection.

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VII. CONCLUSION

This Court should find Alan Croft is entitled to qualified immunity and reverse the trial court's determination, vacate the jury's verdict as to Croft, and void the award of attorneys fees and costs. In the alternative, this Court should remand the case for a new trial regarding what process is due Segaline under the Fourteenth Amendment regarding entering a public office.

RESPECTFULLY SUBMITTED this 15th day of June, 2016.

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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

MICHAEL SEGALINE, Respondent, v. STATE OF WASHINGTON, et al., Appellants.	(Thurston County Cause No. 05-2-01554-1) CERTIFICATE OF SERVICE

I, Amanda Trittin, hereby certify that on June 15, 2016, I caused to be sent for service a copy of the foregoing document entitled APPELLANTS' BRIEF on the attorney for Respondent, as set forth below:

Attorneys for Plaintiff:	[**x**] United States Mail [ ] Hand Delivered by Legal Messenger
Jean Schiedler-Brown 606 Post Ave Ste 101 Seattle, WA 98104	[ ] UPS Overnight Mail [**x**] Email

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 15th day of June, 2016, at Olympia, WA.

AMANDA TRITTIN

WASHINGTON STATE ATTORNEY GENERAL

June 15, 2016 - 4:27 PM

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